FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-1589

GENERAL ELECTRIC COMPANY,
Petitioner,

vs.

MARTHA V. GILBERT, et al.,
Respondents.

NO. 74-1590

MARTHA V. GILBERT, et al.,
Petitioners,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO

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INTEREST OF STATE OF OHIO

The laws of the State of Ohio prohibit discrimination on the basis of sex in employment. Ohio Revised Code § 4112.02 (A). Pursuant to this statute, the State is cur-

rently litigating several cases which may be affected by the decision in this case. For this reason, the State of Ohio, by its Attorney General, respectfully submits this brief as *amicus curiae* pursuant to Rule 42, Part IV of the Revised Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 519 F.2d 661 (1975), *Gilbert* v. *General Electric Company*.

The opinion of the District Court for the Eastern District of Virginia is reported at 375 F.Supp. 367 (1974). Earlier opinions of the District Court with respect to venue, class certification and joinder of third party defendants are reported respectively at 347 F.Supp. 1058, 59 F.R.D. 267 and 59 F.R.D. 273.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals for the Fourth Circuit affirming the judgment of the District Court of the Eastern District of Virginia was entered on June 27, 1975. The petition for writ of certiorari was granted on October 14, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Section 703 (a) (1) of Title VII of the Civil Rights Act of 1964, Act of July 2, 1964, 78 Stat. 253, 42 U.S.C. § 2000e-2 (a) (1).

QUESTION PRESENTED

Whether the adoption of a disability income protection plan which admittedly treats women differently than men by excluding coverage of disabilities due to pregnancy is sex discrimination prohibited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (a) (1).

STATEMENT OF FACTS

General Electric Company is a manufacturing company with plants throughout the country. General Electric provides weekly benefit payments for non-occupational sickness and accidents to all of its employees. The amount of such payments is equal to sixty (60) percent of an employees straight time weekly wage up to a maximum benefit of one hundred and fifty dollars ($150.00) per week for each week the employee is absent and unable to work because of disability which results from a non-occupational sickness or accident. The benefit payments will be made for up to twenty-six (26) weeks for any one continuous period of disability or successive periods of disability due to the same or related cause. The only exception to the benefits plan is that sickness or other disabilities arising from pregnancy, miscarriage or childbirth are not included.

The District Court for the Eastern District of Virginia held that the denial of pregnancy-related disability benefits violated Title VII of the Civil Rights Act of 1964, as amended. *Gilbert* v. *General Electric Company*, 375 F. Supp. 367 (1974). This decision was affirmed by the Court of Appeals for the Fourth Circuit. *Gilbert* v. *General Electric Company*, 519 F.2d 661 (1975).

For a further statement of facts, the stipulated facts set out by the District Court in *Gilbert*, *supra*, at 369-375 are adopted herein.

SUMMARY OF ARGUMENT

General Electric Company's disability income plan violates Title VII because it provides dissimilar treatment for men and women who are similarly situated. While it is true that all women workers are not pregnant at any given time, women in the labor force are susceptible to becoming pregnant. It is not necessary that all women be adversely affected by the policy in issue; it is only necessary that women are affected by the policy at a differential rate than men in order to trigger Title VII review.

Where a policy is demonstrated to have discriminatory effects, it can only be justified by business necessity. General Electric Company's only business justification for the challenged policy, increased costs of the benefits plan if pregnancy disabilities are included, does not meet the strict requirements of the business necessity test.

Finally, it is essential in this case to keep the issue in focus: the question is not whether the Equal Protection Clause of the Fourteenth Amendment requires inclusion of disabilities relating to pregnancy within a disability insurance program, but whether Title VII of the Civil Rights Act of 1964 requires such inclusion. Reliance by petitioners on *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), is misplaced because the case at bar concerns statutory interpretation rather than constitutional analysis found in *Aiello.*

Title VII of the Civil Rights Act of 1964 makes unlawful as sex discrimination, petitioner's exclusion of pregnancy disabilities from its disability insurance program even though a similar insurance program of a government body might not be violative of the Equal Protection Clause of the Fourteenth Amendment.

The Constitution does not set outside limits on what discriminatory acts may be made unlawful. Rather, it sets

lower limits on what discriminatory acts are unconstitutional and cannot be made lawful. Thus, while Congress cannot make lawful those actions forbidden by the Fourteenth Amendment, Congress can make unlawful, actions which are not violative of the Fourteenth Amendment itself.

I. GENERAL ELECTRIC'S FAILURE TO COVER DISABILITY DUE TO PREGNANCY IS UNLAWFUL SEX DISCRIMINATION IN VIOLATION OF TITLE VII.

The decision of this Court in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), makes it clear that, under Title VII, "what is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification". *Id.* at 431. Providing a male employee disabled from heart disease or prostrate surgery, with insurance benefits, but denying a female employee, disabled from pregnancy, those same benefits is certainly arbitrary. It is also unlawful due to the disparate effect which such a policy has on women employees.

Dissimilar treatment for men and women who are similarly situated has been held unlawful under Title VII in a variety of contexts in addition to pregnancy disability benefits. *Phillips* v. *Martin-Marietta Corp.,* 400 U.S. 542 (1971) (held that company could not exclude women with pre-school age children from employment opportunities unless they also exclude men with pre-school age children); *Sprogis* v. *United Airlines, Inc.,* 444 F.2d 1194 (7th Cir. 1971) (held that it was illegal to apply "no marriage" rule solely to stewardesses and not to male employees and that

this regulation could not be justified as a BFOQ because of customer preference) ; *Bartmess* v. *Drewrys, U.S.A., Inc.,* 444 F.2d 1186 (7th Cir. 1971) (discrimination with regard to "fringe benefits" such as retirement plans which set different compulsory ages for retirement for men and women are prohibited by Title VII) ; *Weeks* v. *Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228 (5th Cir. 1969) (held that refusal to consider or hire women for jobs as switchmen was unlawful) . *See also Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969) .

General Electric's disability benefits plan protects male employees from the financial strain occasioned by virtually all planned or unplanned physical disabilities which they are likely to encounter. In contrast, female employees who are uniquely susceptible to disability due to pregnancy are not covered by the plan during their period of physical disability. Therefore, the impact of the plan is adverse to women employees and discriminates on the basis of sex.

While it is true that all women workers are not pregnant at any given time, women in the labor force are susceptible to becoming pregnant.[1] It is not necessary that all women be adversely affected by the policy in issue; it is only necessary that women are affected by the policy at a differential rate than men in order to trigger Title VII review.

A similar situation was presented to this Court when it considered the so-called "grandfather clauses" which exempted from the required literacy test for voting, all per-

[1] In recent years the most rapid gains in labor force participation rates of women have occurred among wives under age 35, and especially among those with children under six. Waldman & Whitmore, *Children of Working Mothers, March 1973,* 97 Monthly Labor Rev. 50, 52 (May, 1974). Since 1940, the proportion of working women who are married has increased from 30 to 60 percent. Waldman & McEaddy, *Where Women Work — An Analysis by Industry and Occupation,* 97 Monthly Labor Rev. 3 (1974).

sons entitled to vote on a given date, prior to ratification of the Fifteenth Amendment or those whose ancestors were then entitled to vote. While all black persons were not disenfranchised by these clauses, a significant, though by no means *absolute,* number of blacks were harmed, although the policy was neutral on its face. However, a differential rate of black persons were, like the women employees in the instant case, susceptible to being harmed by it. Thus, this Court, finding that no purpose was served by the "grandfather clauses" other than to evade the commands of the Fifteenth Amendment declared "grandfather clauses" invalid. *Guinn* v. *United States,* 238 U.S. 347 (1915) . *See also Myers* v. *Anderson,* 238 U.S. 368 (1915) .

Under Title VII, as in the "grandfather clause" cases, courts have not required that all members of a class be discriminated against to render a practice unlawful. What is required is that the policy affects a disproportionate number of members of such class. Thus, unlawful discrimination in employment was found under Title VII on the basis of excessive garnishment, *Johnson* v. *Pike Corporation of America,* 332 F.Supp. 490 (D.C. Calif. 1971) , parenthood of illegitimate children, *Davis* v. *American National Bank of Terrell, Texas,* Civ. Case No. CA3-4512 (N.D. Tex. — F.Supp. —, 1971) , and relationship to current employees or union members; *United States* v. *Sheet Metal Workers' International Assoc., Local No. 36 and IBEW Local No. 1, AFL-CIO,* 416 F.2d 123 (8th Cir. 1969) .

Further, the exclusion of pregnancy disability under the disability benefits plan at issue undermines the spirit and letter of Title VII. As Congress has indicated in its most recent consideration of equal employment opportunity, "discrimination against women is no less serious than other

forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination". House Report on Equal Employment Opportunity Enforcement Act of 1972, 2 U.S. Code Cong. and Admin. News 2140 (92nd Cong., 2nd Sess. 1972).

Finally, the guidelines promulgated by the Equal Employment Opportunity Commission support this view. 29 C.F.R. § 1604.10 (b) provides:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availablity or extension, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

The Court below accorded deference to the EEOC guidelines in reaching its decision and found them to be consistent with Congressional intent, unlike the guidelines considered in this Court's opinion in *Espinoza* v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973). The guidelines should be given deference because it is the Equal Employment Opportunity Commission which is charged with the enforcement of the statute. *Griggs* v. *Duke Power Co., supra*; *Phillips* v. *Martin-Marietta Corp., supra*; and *Satty* v. *Nashville Gas Company*, 522 F.2d 850 (6th Cir. 1975).

It is apparent that General Electric has offended the policy and requirements of Title VII by treating female employees differently from male employees and by excluding disability due to pregnancy from its disability benefits plan, which exclusion has an adverse impact on women workers who are susceptible to becoming pregnant.

Under either the "adverse impact" or the "disparate treatment" tests, General Electric's policy of excluding disability due to pregnancy from its disability benefits plan is sex discrimination.

II. GENERAL ELECTRIC HAS NOT OVERCOME THE SEXUAL IMPACT OF ITS POLICY BY REASONS OF BUSINESS NECESSITY.

If an employer implements a policy or practice which has an adverse impact upon a protected class of employees, this fact in itself does not render the policy or practice illegal under Title VII.[2] Upon a showing of an adverse impact on a protected class of employees, the burden shifts to the employer to justify its policy or practice by reasons of a business necessity to negate the illegal policy or practice. *Griggs* v. *Duke Power Co., supra*; *Robinson* v. *Lorillard Corporation*, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971); *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC* v. *United States*, 416 F.2d 980 (5th Cir. 1969).

The business necessity test was mandated by Congressional intent as a reasonable standard to maintain an employer's policies and practices which discriminate against

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[2] Should this Court find that the policy at issue herein is outright disparate treatment based on sex, however, the business necessity [illegible] would not apply and there would be no defense to the Title [illegible] violation.

a protected class of employees but which are absolutely necessary to continue the operation of the business. *Robinson* v. *Lorillard Corp., supra.* If business necessity cannot be shown, the policy or practice must fall. In *Griggs,* this Court succinctly stated the rule:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operated to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. 401 U.S. at 424.

Although General Electric "makes no claim for relief under this [business necessity] exception", *Gilbert,* 519 F. 2d 661 at 667, and thus application of the business necessity rule to this case is unnecessary, the Company did adduce evidence of increased costs to explain the policy. While cost projection analysis and statistical studies introduced by Petitioner and Respondents were found by the District Court in *Gilbert, supra,* at 379, to be too speculative in nature to be probative of actual future costs, the Court did find that inclusion of pregnancy disability benefits into the present plan would increase General Electric's costs.

Increased cost alone does not constitute a business necessity defense. Such a defense is premised upon a showing that the discriminatory conduct is necessary to the safe and efficient operation of the business. *Jones* v. *Lee Way Motor Freight,* 431 F.2d 245 (10th Cir. 1970). One court has stated that "[N]ecessity connotes an irresistible demand". *United States* v. *Bethlehem Steel Corporation,* 446 F.2d 562 (2d Cir. 1971). The situation here does not even come close to these business necessity standards.

Any costs incurred by General Electric under the disability benefits plan are incurred by virtue of its contractual obligations with its unions. "The rights assured by

Title VII are not rights which can be bargained away — either by a union, by an employer, or by both acting in concert". *Robinson* v. *Lorillard Corp., supra,* at 799.

Assuming *arguendo* that exorbitant costs will result if pregnancy-related disabilities are covered by General Electric's plan, the question remains whether the plan can be altered to meet the Title VII proscriptions without an increase in costs. In *Robinson* v. *Lorillard, supra,* the Court of Appeals for the Fourth Circuit found that the employer who has a practice which has an adverse impact upon a protected class of employees must explore alternatives to determine whether there exists an acceptable alternative which accomplishes the business purpose advanced and which has a lesser impact. The Court stated:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business . . . there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

In this case, the Company's business purpose is to adopt a plan which provides disability benefits to its employees. That plan may change from time to time due to the economy, laws, internal employment policies, and other forces. If this Court finds that General Electric's policy of excluding pregnancy-related disabilities violates Title VII, the Company could amend the policy to either account for or offset any increased costs resulting from complying with the law.[3] In any event, the plan finally implemented must meet the legal requirements of Title VII.

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[3] For example, the State of Ohio has adopted a state employee disability income protection plan which provides a maximum of three years benefits to all employees and covers pregnancy-related disabilities.

III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROHIBITS ALL SEX DISCRIMINATION IN CONDITIONS OF EMPLOYMENT AND MAKES UNLAWFUL SEX DISCRIMINATION WHICH MAY NOT BE UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

It is essential in this case to keep the issue in focus: the question is not whether the Equal Protection Clause of the Fourteenth Amendment requires inclusion of disabilities relating to pregnancy within a disability insurance program, but whether Title VII of the Civil Rights Act of 1964 requires such inclusion. Reliance by General Electric on *Geduldig* v. *Aiello, supra,* is misplaced because the case at bar concerns statutory interpretation rather than constitutional analysis found in *Aiello.*

Implicit in the Company's reliance on *Aiello, supra,* is the premise that Congress, in legislating against discrimination, cannot make *unlawful* as sex discrimination that which is not *unconstitutional* as sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

Aside from any factual distinctions between this case and *Aiello,* it is clear that such a premise is unfounded. Congress can remedy problems as they perceive them and make unlawful, actions which are, nonetheless, constitutional.

General Electric's argument:

> . . . presupposes that the lawful scope of employment policies under the former Act [Title VII] is coextensive with the latter constitutional provision [Fourteenth Amendment]. We believe that the better approach permits Title VII under the Commerce Clause to extend beyond the reach of the Equal Protection Clause. *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294. Otherwise, Title VII's effective reach would be limited by the decisions of the Supreme Court, a result effectively curtailing its implementation. *Satty* v. *Nashville Gas Co., supra* at 855.

In *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), the Attorney General of the State of New York argued that the Voting Rights Act of 1965 "could not be sustained as appropriate legislation to enforce the equal protection clause unless the judiciary decides that the state action prohibited by the act of Congress is forbidden by the equal protection clause itself. This Court disagreed with the New York State Attorney General stating at page 653 that:

> . . . it was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.

Thus, the Voting Rights Act of 1965 made certain actions on the part of the State of New York unlawful, even though such actions were not unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Similarly, herein, Title VII of the Civil Rights Act of 1964 makes unlawful as sex discrimination General Electric's exclusion of pregnancy-disabilities from its disability insurance program even though a similar insurance program of a government body might not be violative of the Equal Protection Clause of the Fourteenth Amendment.

In a related vein, even though there may be no constitutional duty to act under the Fourteenth Amendment to undo *de facto* school segregation, because such discrimination may not be unconstitutional, state legislatures can pass legislation making it unlawful and school boards can take action to eliminate such segregation. *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 16 (1971); *Offermann* v. *Nitkowski,* 378 F.2d 22 (1967); *Porcelli* v. *Titus,* 431 F.2d 1254 (3d Cir. 1970); *Tometz* v. *Board of Education,* 39 Ill. 2d 593, 237 N.E.2d 498 (1968); *Addabbo* v. *Donovan,* 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), *cert. denied,* 382 U.S. 905 (1965).

The lesson of these cases is that the Constitution does not set outside limits on what discriminatory acts may be made unlawful. Rather, it sets lower limits on what discriminatory acts are unconstitutional and cannot be made lawful. Thus, while Congress cannot make lawful those actions forbidden by the Fourteenth Amendment, Congress can make unlawful, actions which are not violative of the Fourteenth Amendment itself.

Comparing the difference between statutory interpretation and constitutional analysis, the Court of Appeals below stated:

> There is a well-recognized difference of approach in applying *constitutional* standards under the Equal Protection Clause as in *Aiello* and in the statutory construction of the "sex-blind" mandate of Title VII. To satisfy constitutional Equal Protection standards, a discrimination need only be "rationally supportable" and that was the situation in *Aiello,* as well as in *Reed* and *Frontiero.* The test in those cases was legislative reasonableness. Title VII, however, authorized no such "rationality" tests in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. (Emphasis in original). 519 F.2d 661 at 667.

All of the Circuit Courts of Appeal which have considered this question, and the majority of the District Courts as well, have recognized the difference between applying constitutional standards on the one hand, and statutory construction on the other, and such courts have held that *Aiello, supra,* is not dispositive of a claim for pregnancy disability benefits under Title VII. *Satty* v. *Nashville Gas Company, supra*; *Wetzel* v. *Liberty Mutual Ins. Co.,* 511 F.2d 199 (3d Cir. 1975), *vacated,* 44 U.S.L.W. 4350 (March 23, 1976); *Communications Workers* v. *American T. & T. Co.,* 513 F.2d 1024 (2d Cir. 1975). *See also Holthaus* v. *Compton & Sons,* 514 F.2d 651 (8th Cir. 1975); *Zichy* v. *City of Philadelphia,* 392 F.Supp. 338 (E.D. Pa. 1975; *Sale* v. *Board of Education,* 390 F.Supp. 784 (N.D. Iowa 1975); *Vineyard* v. *Hollister Elementary School District,* 64 F.R.D. 580 (N.D. Cal. 1974).

Nor would affirming the decision of the Court of Appeals below impose a different standard upon private, as opposed to public, employers. *Aiello* concerned requirements imposed by the Equal Protection Clause of the Fourteenth Amendment, not those imposed by Title VII. Title VII, as amended by Congress in 1972, applies to state and local governments as well as to private employers. The prohibitions and requirements of the act, whatever they are determined to be, will be equally applicable to the public and private sectors.

CONCLUSION

The State of Ohio respectfully requests the Court to affirm the lower court's decision on the basis of the record in this case and the legal arguments presented herein.

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